No. 7711

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN TRUST COMPANY,

Appellant,

vs.

J. O. ENGLAND, as Trustee in Bankruptcy of Northern Counties Land and Cattle Company (a corporation), Bankrupt, COAST HOLDING CORPORATION (a corporation), and FRANK T. ANDREWS, as Trustee in Bankruptcy of Alexandria Hotel Realty Corporation (a corporation), Bankrupt,

Appellees.

BRIEF FOR APPELLEES J. O. ENGLAND, AS TRUSTEE IN BANKRUPTCY OF NORTHERN COUNTIES LAND AND CATTLE COMPANY, A CORPORATION, BANKRUPT, AND COAST HOLDING CORPORATION, A CORPORATION.

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STATEMENT OF FACTS.

This is an appeal from the order made by Honorable T. J. Sheridan, Referee in Bankruptcy, under date of March 24, 1934, and affirmed by Honorable A. F. St. Sure, United States District Judge, under date of October 17, 1934, directing Frank T. Andrews, trustee in bankruptcy of Alexandria Hotel Realty Corpora-

tion, a corporation, bankrupt, to pay to J. O. England, as trustee in bankruptcy of Northern Counties Land and Cattle Company, a corporation, certain funds aggregating $4359.03, constituting the net proceeds of the operation by the said Frank T. Andrews as such Trustee, of a cattle range referred to herein as the "Diamond Range".

The question presented is a determination of the rights of the respective parties to said fund.

At all times here involved the Northern Counties Land and Cattle Company, a corporation, was the owner of that certain real property located in Tehama County, California, which will hereafter be referred to as the "Diamond Range". The American Trust Company is the Trustee under a trust deed securing a bond issue constituting a first encumbrance on the Diamond Range. The second mortgage is not concerned in the present proceeding. The Alexandria Hotel Realty Corporation, a corporation, was the holder of a third mortgage on said Diamond Range, said third mortgage being in the form of a deed absolute. (Record, page 33.) Prior to any of the proceedings hereinafter mentioned, the Alexandria Hotel Realty Corporation, was adjudged bankrupt, and Frank T. Andrews became the trustee in bankruptcy of said corporation.

The said Frank T. Andrews, as such trustee in bankruptcy, entered upon the said Diamond Range on September 17, 1932, and thereafter operated said property under circumstances hereinafter more particularly set forth. On October 13, 1932, appellant, American Trust Company, trustee under said trust

deed, filed with the Referee in Bankruptcy in the matter of the bankruptcy proceedings of said Alexandria Hotel Realty Corporation, a petition for an order authorizing the sale of said Diamond Range, and also a petition for an order sequestering the proceeds of its operation by Frank T. Andrews, as such trustee in bankruptcy. As stated in appellant's brief, the petition for sale was denied without prejudice to the renewal thereof not less than 60 days thereafter, and on January 26, 1933, the said Referee made an order granting the petition for order of sequestration and directing Frank T. Andrews to apply the proceeds thereof as set forth on page 2 of appellant's brief.

The Northern Counties Land and Cattle Company, a corporation, mortgagor and owner of the fee of said Diamond Range, was not made a party to nor joined in any manner in said sale proceedings or in said sequestration proceedings, and, of course, was not bound thereby.

On July 26, 1933, the said Referee made an order granting a supplemental petition of the American Trust Company for authority to sell and directed Frank T. Andrews, trustee in bankruptcy of the Alexandria Hotel Realty Corporation, to surrender possession of the property to the American Trust Company. Pursuant to said order Frank T. Andrews surrendered possession on August 12, *1933*. (Record, page 34.) The Northern Counties Land and Cattle Company was not made a party to nor joined in this last-mentioned proceeding. *All of the moneys in dispute here were collected by Andrews before the appellant took actual possession on August 12, 1933.*

On July 28, 1933, the Northern Counties Land and Cattle Company (mortgagor and owner of the fee) served upon said Frank T. Andrews its claim to the funds in his possession, and demanded that said Andrews deliver to it the rents, issues and profits derived from said Diamond Range. On September 14, 1933, the American Trust Company filed with said Refere in connection with the proceedings of the Alexandria Hotel Realty Corporation, bankrupt, its petition for release of impounded funds (Record, page 2) to which petition Frank T. Andrews, as trustee of said Alexandria Hotel Realty Corporation filed his answer in which was set forth the claim made upon him on July 28, 1933, by the Northern Counties Land and Cattle Company claiming the said funds, and praying for an order requiring said Northern Counties Land and Cattle Company to propound any claim or interest which it might have or assert against the said funds. (Record, pages 7-12.)

Pursuant to said answer the Northern Counties Land and Cattle Company appeared in the proceedings *for the first time* and filed its claim to said funds, and Coast Holding Corporation, a corporation, a creditor of Northern Counties Land and Cattle Company, after leave of Court first obtained, filed its answer to the order to show cause issued upon the answer of said Frank T. Andrews, praying that the funds be paid to the Northern Counties Land and Cattle Company, or to its trustee in bankruptcy upon his election and qualification. An involuntary petition in bankruptcy had been filed against said Northern Counties Land and Cattle Company on October 25,

1933. (Record, page 27.) Thereafter, to-wit, on February 14, 1934, J. O. England became the duly appointed, qualified and acting trustee in bankruptcy of Northern Counties Land and Cattle Company (pending in the United States District Court for the Northern District of California, numbered 23,803-L) and by stipulation of all parties it was agreed that said J. O. England, as trustee in bankruptcy of said Northern Counties Land and Cattle Company, should for all of the purposes of the said proceedings, be substituted in the place and stead of the Northern Counties Land and Cattle Company, a corporation. (Record, page 53.)

Prior to October 13, 1932, the date upon which the American Trust Company filed its original petition to sequester the funds, Frank T. Andrews had received as the net proceeds of his operation of the Diamond Range the sum of $658.66. The balance of the funds in his possession were collected by said Andrews between October 13, 1932, and August 12, 1933, the date that said Andrews surrendered possession of the Diamond Range to the American Trust Company, pursuant to the order made by the Referee under date of July 26, 1933, as aforesaid.

All of the parties hereto stipulated that they would be bound by the decision of the United States District Court provided, however, that nothing contained in said stipulation should preclude any party from appealing from any order or decision of the Court. (Record, page 89.) The sole purpose of this stipulation was to avoid multiplicity of suits and to make a decision of the issues presented herein binding upon the

parties hereto. Pursuant to said stipulation the order of the United States District Court affirming the order theretofore made by the Referee in Bankruptcy was rendered providing that the order should stand as a final determination of the merits, pursuant to the stipulation of the parties. (Record, page 94.)

The facts show that Frank T. Andrews, the Trustee of Alexandria Hotel Realty Corporation, entered upon the Diamond Range on September 17, 1932, and that his reason for entering upon the property at that time was "that he went on said property to see what was doing and found the same inactive; that it had not been producing any revenue; that he made arrangements at that time to lease land and run cattle on said Diamond Range". (Record, page 38.) Both the facts and findings show that Frank T. Andrews did not ask for or obtain the consent of the Northern Counties Land and Cattle Company before entering upon said property and that at no time was action taken by the Northern Counties Land and Cattle Company, a corporation, or its directors, authorizing, consenting to or acquiescing in the possession thereof by the said Andrews. (Record, pages 38, 39, 40, 41, 42.) The facts further show that at the time said Andrews entered upon the Diamond Range the capital stock of the Northern Counties Land and Cattle Company was the subject of the trust indenture in which Pacific National Bank was trustee, and that during the month of September, 1932, under a demand for possession of all properties covered by the said trust indenture, the said Pacific National Bank came into possession of all

of the outstanding capital stock of the Northern Counties Land and Cattle Company and thereupon officers of the Pacific National Bank were regularly substituted for and as officers of said Northern Counties Land and Cattle Company, a corporation (Record, pages 41 and 43), and that within a month after September 17, 1932 (the date on which Frank T. Andrews entered upon the Diamond Range), he was notified by one John Geary, representing the said Pacific National Bank, that he was in unlawful possession of said Diamond Range. (Record, pages 40 and 41.)

All of the aforementioned proceedings instituted by the American Trust Company were had in the matter of the Alexandria Hotel Realty Corporation, a corporation, bankrupt, pending in the United States District Court for the Northern District of California, Southern Division, action therein numbered 22131-S, and the first occasion upon which Northern Counties Land and Cattle Company (the owner of the fee, and mortgagor), was brought in as a party thereto was pursuant to the order to show cause issued by the Referee on September 30, 1933, upon the answer of Andrews to the petition for release of impounded funds filed by American Trust Company on September 14, *1933*. (Record, page 74.)

Inasmuch as the position of appellee Coast Holding Company is that of a creditor of the Northern Counties Land and Cattle Company, the owner-mortgagor, the said Coast Holding Company has deemed it best to join with J. O. England, as trustee in bankruptcy, of

said mortgagor, upon this brief, which is hereby respectfully submitted as the joint brief of said appellees.

ARGUMENT.

A. APPELLANT'S AUTHORITIES ARE READILY DISTINGUISHABLE.

At the outset we desire to distinguish the cases relied on by appellant, and to point out that such cases utterly fail to support the propositions upon which appellant has cited them. In fact, most of appellant's authorities will be found to actually support these appellees.

Opposing counsel commence their argument by quoting a portion of appellant's mortgage or deed of trust which they claim in and of itself entitles appellant to the rents collected by Andrews. We shall hereinafter demonstrate that these particular provisions of the mortgage do not even purport to automatically entitle appellant to the rents, issues and profits of the mortgaged premises, but on the contrary are expressly conditioned upon the prior performance by appellant of certain requirements, in the nature of express conditions precedent, which it never in fact performed or attempted to perform.

In fact, opposing counsel themselves recognized the utter fallacy of their contentions by conceding, at page 10 of their brief, that appellant would not be entitled to rents accruing prior to the time appellant first moved to have the rents, issues and profits sequestered.

In other words, appellant recognizes the fact that certain steps and proceedings had to be taken by it before it could claim to be entitled to said rents.

The first case cited by opponent, that of *Synder v. Western Loan and Building Co.,* 1 Cal. (2nd) 697; 37 Pac. (2nd) 86, falls far short of supporting appellant. In that case the mortgagee actually acquired possession of the encumbered property *to the exclusion of the mortgagor* and collected rents while so in possession. The Court held that in such event the mortgagee might retain such rents so collected and apply same against the mortgage debt. In our case the appellant never at any time during the period in question actually entered into possession and did nothing, pursuant to the trust instrument or otherwise, toward excluding the mortgagor from the possession of the property. The cases are utterly dissimilar on their facts. Even assuming for the moment that appellant's mortgage gave it the right to take possession, still appellant never endeavored to exercise this right *as against the mortgagor* and until this was done appellant could acquire no right to the rents. Appellant was content merely to seek an order of sequestration against Andrews, the junior mortgagee, which was utterly ineffective against the mortgagor, either to exclude the mortgagor from possession or to otherwise affect or cut off any of the preexisting rights of the mortgagor, because the mortgagor was not made a party to the sequestration proceedings so as to be bound thereby. Clearly appellant never became a "mortgagee in possession".

Referring to the next case cited (Appellant's Brief, page 9), that of *Mines v. Superior Court,* 216 Cal. 776; 16 Pac. (2nd) 732, a reading thereof shows clearly that the case merely holds that a trustee under a deed of trust may commence an action against the trustor for the specific performance of the provisions of a deed of trust and may, in such action, obtain the appointment of a receiver to take possession of the premises and collect the rent. This principle is in no way involved in the case at bar. The appellant here never at any time during the period in question instituted any proceeding for the appointment of a receiver for the property nor any proceeding analogous thereto. At least it commenced no such proceeding to which the trustor here was ever made a party, nor were the monies in question collected by any person acting as receiver for the appellant. These monies were collected by Andrews as trustee in bankruptcy for the bankrupt estate of Alexandria Hotel Realty Corporation, whom we will hereafter refer to for the sake of brevity as the "junior mortgagee", purporting to act on his own behalf solely. Thus the *Mines* case, supra, is inapplicable and therefore does not support appellant in the slightest.

The next case, that of *American Securities Co. v. van Loben Sels,* 218 Cal. 662; 24 Pac. (2nd) 499, is in exactly the same category as the *Mines* case, supra, merely holding that in an action for specific performance of a deed of trust a receiver may be appointed. In fact, the Court, in the *American Securities* case, supra, based its decision therein entirely on its previ-

ous decision in the *Mines* case, supra; and for these reasons the case is not in point.

B. THE MORTGAGOR IS NOT BOUND BY THE ORDER OF SEQUESTRATION, AND THE MORTGAGOR'S RIGHTS REMAIN UNIMPAIRED THEREBY.

The important fact in our case is, as is shown in appellant's own brief at page 5 thereof, *that the Northern County Land and Cattle Co., whom we shall herein refer to as the "mortgagor", was never at any time or in any manner made a party to any of the proceedings in question until after the monies in dispute had already been collected by the junior mortgagee.* Furthermore, at the time when the order of sequestration was granted the mortgagor was not a party to those proceedings, and under no possible theory can the mortgagor or its bankruptcy trustee be concluded or bound in any way by such order. In the first place the order does not even purport to bind the mortgagor; and even if it should so purport, it could not legally be binding on the mortgagor inasmuch, as has been pointed out, the Court making it had no jurisdiction over the person of the mortgagor at the time it was made. These principles of jurisprudence are so well established as to need no citation of authority. The fact of great significance to be noted at this point is that this same order, the so-called order of sequestration, which is not binding on the mortgagor, as we have seen, is the very order upon which appellant's entire claim to these monies is based. In fact, since appellant chose to take no action or proceeding against the mortgagor *directly,*

appellant is necessarily thereby forced to rely solely and entirely upon this order of sequestration. In view of the utter invalidity of the order of sequestration, at least in so far as the mortgagor is concerned, it not being a party thereto, it should be apparent that appellant must fail upon this appeal.

Referring again to appellant's authorities, we wish to point out that in none of them, so far as we can determine, is there any case going so far as to hold that a mortgagee, trustee or beneficiary can acquire or claim any right to rents, issues and profits unless and until possession of the encumbered premises is actually and lawfully taken and the rents, issues and profits collected while such possession continues, or unless and until a receiver has been appointed for such purpose by some court of competent jurisdiction.

In *Mortgage Loan Co. v. Livingston,* 45 Fed. (2nd) 28, cited and quoted from at pages 10 to 14 of opponent's brief, the mortgagees *requested* a bankruptcy receiver *of the mortgagor* to apply the rents against the mortgage debt, and the receiver voluntarily and willingly consented to comply with this request and thereupon did so comply. The principles there involved were vastly different than in the case at bar for in that case the situation was one where the mortgagee obtained the express consent of the mortgagor's representative or successor in interest, viz., his bankruptcy receiver, to the paying over or applying of the rents. The distinguishing feature in this last mentioned case is clearly pointed out and stressed by the Court in the opinion itself, more particularly in the

portion of the opinion quoted at page 13 of the opposing counsel's brief, reading as follows:

> "This is not a case where the mortgagor was permitted to remain in possession of the property and to receive and disburse the earnings, but is a case where a receiver was appointed, who, *at the demand of the mortgagees,* collected, impounded and separately kept these funds. *He was their receiver,* and nothing was done by him with these funds during his stewardship inconsistent with their application to a discharge of the pledge, and hence it cannot be said that the mortgagees are precluded from asserting their rights thereto by having remained silent. * * *" (Italics ours.)

In other words, the Court itself likened that case to one where *the mortgagee* himself had procured the appointment of a receiver to collect the rent, and the case was expressly decided on this sole ground. As we have heretofore pointed out the appellant in our case never took possession of the property, in person or by receiver, and the *Mortgage Loan Company* case, supra, clearly would not apply for that reason.

At page 11 of their brief, opposing counsel quote the following portion of the decision of the Court in the *Mortgage Loan Co.* case, supra, which strikes us as being directly in support of the contention we are here making concerning the effect of the invalidity of the order of sequestration. The portion quoted to which we refer reads as follows:

> "* * * *In the absence of a receivership, or other process by which the mortgaged property is in the control of the court,* a mortgagee of real property

> would not be entitled to the rents and profits of the mortgaged premises until he had taken actual possession, or until possession were taken in his behalf by a receiver, or until he had demanded such possession. Grafeman, etc., Co. v. Mercantile Club, 241 S. W. 923; Teal v. Walker, 111 U. S. 242, 4 S. Ct. 420, 28 L. Ed. 415; Freedman's Savings & Trust Co. v. Shepherd, 127 U. S. 494, 8 S. Ct. 1250, 32 L. Ed. 163; Atlantic Trust Co. v. Dana (C. C. A.), 128 F. 209, 219." (Italics ours.)

The announcement of this principle by the Circuit Court of Appeals of the Eighth Circuit, supported by two United States Supreme Court decisions in addition to other authority, should bear considerable weight with this Honorable Court, we submit, and in the face of these principles we cannot perceive by any stretch of the imagination how appellant can succeed on this appeal. The Court most plainly stated that in order for a mortgagee to entitle itself to rents, and profits of the kind here involved, it must first obtain the right thereto with the aid of some court which had obtained *"control"* of the mortgaged premises by means of some proper and effective *"process"*. Concededly no Court can validly control property, whether it be mortgaged premises or the rents and profits therefrom, unless and until the Court has power over and control (jurisdiction) of the parties involved, including the person owning and claiming such property. It is elementary that should a court attempt to control, dispose of or in any way affect the right in and to property of any person without first obtaining jurisdiction and "control" over the person of such owner, any such

attempt would be utterly void and therefore ineffective. Applied to the case at bar these principles necessarily impel the conclusion that the appellant gained no right to the money in question *as against the mortgagor* inasmuch as the Court which purported to give and grant to appellant the alleged rights which it now seeks to enforce, and which is the sole basis of appellant's claim, had absolutely no jurisdiction over the person of the mortgagor at the time the order purporting to grant such right was made. These rent moneys were not "in the control of the Court" at the time it purported to sequester them.

The situation in this respect is similar to that disclosed in *In re Francis-Valentine Co.*, 94 Fed. 793, 2 Am. B. R. 522, 526 (C. C. A., Calif., affirming 93 Fed. 953, 2 Am. B. R. 188), where the sheriff of the City and County of San Francisco was ordered by the Bankruptcy Court to turn over certain property to the bankruptcy trustee which property the sheriff had seized on execution prior to the bankruptcy in an action in which the bankrupt was plaintiff. The sheriff objected to the bankruptcy order, claiming that the Bankruptcy Court had no jurisdiction to summarily compel him to turn over the property to the bankruptcy trustee in view of the fact that a replevin suit, commenced by the American Type Founders Co., a third party claimant, was pending against the sheriff concerning said property. The Court held that the intervention of bankruptcy divested the sheriff of the right to continue in possession of the property just as it would have divested the possession of the bankrupt

itself since as the sheriff was holding for and on behalf of the bankrupt. The Court then went on to hold, in language pertinent to our case, as follows:

> "*The American Type Founders' Co. is not a party to the proceeding in the Bankruptcy Court, and its rights are in no way affected by the order upon the sheriff. It is not represented in the present proceeding.* The question is purely one of the respective rights of the sheriff and of the trustee of the estate of the bankrupt." (Italics ours.)

Thus we have demonstrated beyond question, we submit, that the order of sequestration upon which the appellant must predicate its entire case, at all times was and is void as to the mortgagor on account of the utter lack of jurisdiction over the person of said mortgagor in the Bankruptcy Court purporting to make said order. *On account of this fact, appellant can claim none of the rents, issues and profits which accrued prior to the time the mortgagor became a party to the bankruptcy proceedings.* This means that the appellant can claim no portion of the monies now in dispute, since it all accrued and was collected prior to the mortgagor's appearance in these proceedings.

At this juncture we desire to point out to this Honorable Court that appellant in its brief (page 15) has expressly waived all claim to that portion of the rents, issues and profits of the Diamond Range which were collected by Andrews as Trustee for the junior mortgagee prior to the time when appellant first appeared and petitioned for an order sequestering the proceeds of Andrew's operations. The sum to which

the appellant thus waives all claim amounts to $658.66. (Appellant's Brief, page 14.) In other words, appellant has thereby, in effect, consented to the order appealed from being sustained as to this amount at least.

C. APPELLANT'S CONTENTIONS ARE ALL UNSOUND AND FALLACIOUS.

While appellant purports to set forth nine separate alleged errors in its assignment of errors (Record, pages 97-99), so far as we can see these supposedly different alleged errors are merely repetitions or restatements in different phraseology of but four different contentions. It appears to us that appellant's entire position can be resolved into the following contentions, viz.:

(1) That by virtue of its trust deed alone and regardless of any other consideration, appellant is entitled to the rents which Andrews collected subsequent to time appellant moved to sequester them.

(2) That the junior mortgagee was entitled to collect and retain the rents, regardless of the fact that he entered upon the property and collected rents, all without the mortgagor's consent, either express or implied.

(3) That the finding of the Referee, which was approved by the District Court, to the effect that Andrews, as a bankruptcy trustee, took possession of and operated the property without the consent of the mortgagor, is not supported by the evidence.

(4) That the court erred in not directing the payment of taxes out of the net proceeds of the operations in question.

We shall now proceed to consider the aforesaid contentions, each in turn.

(1) The provisions of appellant's deed of trust do not entitle it to these rents.

After quoting certain provisions of the mortgage or deed of trust itself (Appellant's Brief, pages 8-9), appellant, upon the sole basis of these provisions, asserts its claim to the rents collected by the junior mortgagee, but thereupon qualifies its claim but expressly agreeing to restrict itself to the net rentals accruing subsequent to the date upon which it moved to sequester the same. (Appellant's Brief, page 15.) Why should appellant voluntarily restrict itself in this fashion? If the mortgage in and of itself entitled appellant to the rents in the event of a default, as appellant has just claimed, why should it thus waive claim to a considerable portion thereof ($658.66)? In voluntarily thus waiving all claim to such portion of the rents as accrued prior to the moment it first took affirmative action to exercise and rely upon such rights as the trust deed gave it, by filing the sequestration petition, has not appellant thereby recognized and conceded that actually, in law and in fact, it had no valid or effective right merely by force or virtue of the trust deed alone to claim any rents or profits, but only acquire such right through taking some affirmative action to enforce the provisions of the trust deed? Obviously such is the

case, and appellant's admission is quite apparent. Appellant has thus recognized that whatever possessory rights may have been conferred on it by these particular provisions of the deed of trust were but inchoate or potential rights, requiring some additional affirmative acts or proceedings being had or taken by the appellant in order to cause such potential rights to ripen and become actually or legally effective.

Having thus expressly admitted and conceded that the trust deed alone was not sufficient to entitle it to claim any rents or profits, and that some further action or proceeding must first be taken or instituted before any enforceable possessory right could arise, is not appellant obviously thereby compelled to go still further and admit that the further action or proceeding which was thus required of appellant must necessarily be of a sort legally sufficient, particularly from the jurisdictional standpoint, to vest or in some other effective manner affect the rights of the parties involved, which would, of course, include the mortgagor as the other party to the instrument in question? We submit the answer to this last query can only be in the affirmative. Such being the case, can it be for one moment contended that appellant's action in merely filing a petition for sequestration in a proceeding to which the mortgagor had never been made a party, and in a Court which lacked jurisdiction of the parties necessary to decide the controversy, could have been sufficient or adequate, from a standpoint of law, to in any way create rights in the appellant which it admittedly did not enjoy previous thereto and which rights could only be created at the

expense and equivalent loss of the mortgagor? Likewise, could the granting of the order of sequestration by a Court which lacked the necessary jurisdiction to bind the mortgagor, in any way affect or cut off the mortgagor's pre-existing rights and transfer such rights to the appellant mortgagee? Thus analyzed, the appellant's contentions become mere absurdities, we submit, particularly in view of its own admissions made as aforesaid.

In this regard it is quite significant, we believe, that nowhere in opposing counsel's brief have they contended or so much as intimated that they expect to contend that said order of sequestration was binding upon the mortgagor or in any way affected the mortgagor's rights. The appellants from the very beginning chose to proceed against the junior mortgagee alone and to entirely ignore the mortgagor by failing to make the mortgagor a party to the sequestration proceedings.

As pointed out, the order of sequestration constituted a void order as against the mortgagor and, therefore, could at best constitute but an ineffective attempt to exercise any such right of possession as appellant might then have had. Certainly, the order of sequestration, not being binding on the mortgagor, did not serve in the slightest to dispossess the mortgagor or in any way preclude or affect its right to possession.

It is clear, therefore, that appellant cannot claim to be entitled to the rents and profits in dispute by virtue of the aforesaid provisions of said deed of trust, in-

asmuch as it did not comply with the conditions thereof or take the steps or any of the steps which it has conceded were required thereby. Not only did the appellant fail to take possession of the property itself, but furthermore it did not in any legally effective or binding manner *dispossess* the mortgagor therefrom, in whole or in part.

Appellant quotes a portion of the deed of trust (Opponent's Brief, pages 8-9), which is ineffective to support the appellant. The pertinent parts of this portion of the trust deed read as follows:

> "*Upon filing a bill in equity, or upon the commencement of judicial proceedings,* * * * to enforce any right under this Indenture, the trustee shall be entitled to exercise any and all rights and powers herein conferred * * * and shall be entitled to the appointment of a receiver of the * * * earnings, revenues, rents, issues and profits, and other incomes thereof * * *; and shall be entitled to the application *by any such Receiver* of the net income * * *" (Italics ours.)

No proceedings of the kind thus required were here commenced by the appellant, and for that reason said paragraph of the deed of trust cannot apply or benefit the appellant in any way. Said paragraph contemplates, *and in fact expressly requires,* the filing of a bill in equity or the commencement of some other judicial proceeding. Such proceeding must necessarily be commenced *against the trustor.* Otherwise the trustor would not be bound thereby. On the contrary, the appellant elected to entirely ignore these provisions of the deed of trust and chose to proceed

entirely independent thereof by commencing a proceedings *against the junior mortgagee* wherein it failed to join the trustor as a party thereto. Under such circumstances surely appellant cannot now rely upon provisions of the deed of trust which it thus voluntarily elected to ignore. Not having complied with the terms or conditions of the deed of trust itself, appellant cannot claim rights against the mortgagor by virtue of the deed of trust or of any of the provisions thereof, particularly of those provisions of which it thus chose to proceed independently.

We, therefore, arrive at the unescapable conclusion that appellant can derive no benefit from the deed of trust itself, nor upon this appeal can it claim or rely upon any rights predicated upon these provisions of the deed of trust as against the mortgagor. In other words, through none of the steps taken or proceedings instituted did the appellant acquire any *direct rights* as against the mortgagor.

Therefore, appellant must stand or fall, upon this appeal, upon the strength of such proceedings as it instituted as against the junior mortgagee. Appellant can claim no rights as against the mortgagor excepting such, if any, as it may have derived *indirectly* through the junior mortgagee. We assume it must be conceded that the junior mortgagee was and is bound by the order of sequestration and, further, that if the junior mortgagee himself had acquired any rights as against the mortgagor, then the appellant may possibly claim and rely upon the same, if any. We shall now proceed to rule out this last mentioned

possibility, and to that end we shall next inquire as to whether the junior mortgagee at any time during the period in question acquired any rights as against the mortgagor, particularly any right to possession or any right to collect or retain or otherwise handle the rents, issues and profits of the property.

(2) The junior mortgagee entered upon the property unlawfully, by means of a trespass, and cannot claim to have been a "mortgagee in possession".

At the outset of this discussion we may state that it is our contention the junior mortgagee was wrongfully and unlawfully in possession, in the position of a trespasser in so far as the mortgagor was concerned, at all times prior to the moment when the mortgagor was joined as a party to the bankruptcy proceedings; and it will be remembered that the monies in question all accrued and were collected prior to the joinder of the mortgagor as a party.

As heretofore pointed out, the junior mortgagee's mortgage (which constitutes the sole source of any possible right of said junior mortgagee) was in the form of a deed absolute, containing no provision entitling the junior mortgagee to take possession in the event of default or to operate the property or to collect or retain any of the rents, issues and profits. It is definitely settled in California, as set forth recently in the *Snyder* case, supra, at page 701 thereof, and is uniformly the law elsewhere, that a mortgagee acquires no right to possession under a mortgage in the absence of a special agreement, excepting in the event the mortgagor may voluntarily surrender

up such possession by consent, express or implied. *In fact, it is provided by statute in California (C. C. P. 744; C. C. 2927) that a mortgagee is not entitled to possession prior to foreclosure.*

Thus we say, and we submit our contention cannot be disputed, that here the junior mortgagee never at any time, during the period in question, had any right to possession of the mortgaged property or to the rent thereof. Of course, if he had no right to possession he had no right to the rent collected while thus unlawfully in possession.

Appellant contends that the junior mortgagee is entitled to claim the rights of "a mortgagee in possession".

Various definitions as to what constitutes a "mortgagee in possession" may be found amongst the cases and texts. However, the definitions are in agreement in this respect, namely, that the possession of the mortgagee must have been obtained in some legal or lawful manner. In other words, an unlawful possession, viz.: one not based upon any legal right to possession, is not sufficient to entitle a mortgagee to claim rights under this doctrine. In considering the doctrine it is necessary that lawful or legal possession be distinguished from mere physical possession. Mere physical possession without the right to possession is unlawful and, of course, constitutes a trespass. That is to say, possession gained in any manner excepting where the mortgagee had or thereby acquired the right to possession would of necessity be a wrongful or unlawful possession and one not sufficient within the meaning of this rule.

While the junior mortgagee in our case had physical possession, nevertheless his possession was clearly wrongful and unlawful, as not founded upon any right to possession, he having acquired no such right either under the mortgage itself or through any judicial proceeding. The junior mortgagee, therefore, cannot claim the rights of a mortgagee in possession. Andrew, the junior mortgagee, testified that he took advantage of a temporary vacancy of the property and simply went upon the property and commenced to operate the same, no one being there present to oppose him. He testified that he went to the property "to see what was doing and found same inactive". (Record, page 38.) He further testified that he did not ask for the consent of the mortgagor before going into actual possession, nor did he advise or notify the mortgagor of what he intended doing. (Record, page 39.) His entry into possession and his subsequent operation of the property constituted a continuing and unlawful trespass, and, as the cases will demonstrate, the mortgagor could at any time have maintained ejectment proceedings against the junior mortgagee.

We have stated that the junior mortgagee went into possession and continued therein entirely without right. The mortgage itself gave him no such right to enter or right to possession; and it is submitted that under the statutory law of California, a mortgagee can neither have nor acquire any right to possession, which might constitute as lawful an otherwise unlawful entry, unless and until he obtains such right by judicial decree in a foreclosure proceeding or unless he be given such rights either by agreement with

the mortgagor expressed in the mortgage, or by consent, either express or implied, thereafter given by the mortgagor.

Section 744 of our *Code of Civil Procedure* quite plainly and concisely provides that a mortgagee cannot lawfully acquire possession without a foreclosure proceeding having been instituted. Said section reads:

> "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale."

The case of *Nelson v. Bowen,* 124 Cal. App. 662, is cited in appellant's brief. In reality the case supports our position most strongly. When analyzed, it will be noticed that that case was decided entirely on the theory that consent of the mortgagor, either express or implied, was essential in order to constitute a mortgagee in possession. In that case the Court expressly found that the mortgagee had obtained actual possession with the consent of the mortgagor. The mortgagor had voluntarily surrendered up possession of the mortgagee. *If the mortgagor's consent were not necessary, as appellant contends, why should the Court in the Nelson case, supra, have devoted so much consideration and space to a discussion of whether or not the mortgagor's consent had there been given?* In determining what constituted a mortgagee in possession, the Court in the *Nelson* case, plainly expressed their views, which are in support of our contentions and opposed to appellant's, as follows, at page 671:

"The cases cited by the appellant to the effect that an ordinary real estate mortgage gives to the mortgagee no right to the possession of the land, and creates no lien upon, or right to the crops growing and unsevered thereon, correctly states the law as we understand it. * * *

In *Freeman v. Campbell,* 109 Cal. 360, 42 Pac. 35, one of the cases relied upon by the appellant, a distinction was drawn between a mortgagee in possession and one not in possession. *The mortgagee in possession as defined in that case is one who has gone into possession with the consent of the mortgagor.* This, as shown by the authorities which we have cited, may be either express or implied, * * *" (Italics ours.)

And again, at page 670, the Court said:

"As to what constitutes a mortgagee in possession further appears in 17 California Jurisprudence, page 1016, and need not be further elaborated upon herein. The mortgagee who enters and takes possession of the mortgaged premises, cultivates, cares for and harvests the crops thereon, and markets the same *with the consent of the mortgagor,* entitles the mortgagee to deduct from the rents and profits received, all the expenses necessarily incurred in the cultivation, caring for and harvesting of the crops." (Italics ours.)

The principles we are contending for, namely, that consent of the mortgagor is necessary to entitle the mortgagee to any possessory rights, are plainly stated in Section 2927 of the *Civil Code,* which reads:

"*Mortgage does not entitle mortgagee to possession.* A mortgage does not entitle the mort-

> gagee to the possession of the property, unless authorized by the express terms of the mortgage; but after the execution of the mortgage the mortgagor may agree (consent) to such change of possession without a new consideration." (Insertion ours.)

We submit that the junior mortgagee in the instant case quite obviously took possession unlawfully, namely, contrary to the express provisions of the two California statutes aforesaid, and for that reason under none of the definitions of a "mortgagee in possession" which have come to our attention can the junior mortgagee be considered as coming within said classification.

In fact, it strikes us that appellant has conceded our contentions by the statement appearing near the concluding portion of their argument upon this topic (Appellant's Brief, page 23), for they there say:

> "It will be found in every case, however, that the expression (mortgagee in possession) means no more than that the mortgagee is not entitled to retain possession if he acquired it *over the mortgagor's objection,* or by fraud, duress, *or other wrongful acts."* (Insertion and italics ours.)

We have demonstrated that the junior mortgagee entered into the physical possession of the property, and thereafter maintained the same, without any right thereto. Necessarily, by doing this he became a trespasser. In other words, he entered by means of a trespass which must concededly constitute a "wrongful act" within the meaning of the cases. If he en-

tered without right, which we have shown was the case, he must necessarily have entered wrongfully. There is no other possible alternative. Thus we find that appellant has hung itself, so to speak, by its own concessions.

While it may be possible to find an isolated case or so which might indicate that the mortgagor's consent is not a necessary requirement, in every such case it will be found, we submit, that such case was either decided in a jurisdiction wherein the common law prevailed and statutes similar to the aforesaid California code sections were not in force, or the Court decided such case by failing to take such statutes into consideration.

It is impossible to reconcile the case of *Burns v. Hiatt,* 149 Cal. 617, cited by appellant, with said code sections, and it is quite obvious that the Court overlooked them entirely in deciding that case contrary to the express provisions of said code sections which, as we have shown, clearly make necessary the mortgagor's consent to any *rightful* taking of possession by the mortgagee. Colorado has a code section identical in terms with Section 744 of the California *Code of Civil Procedure.* In fact, as was pointed out by the Colorado Supreme Court in *Moncrieff v. Hare,* 87 Pac. 1082, 7 L. R. A. (N. S.) 1001, 1012, the Colorado code section (Section 261 of the Colorado Code of Civil Procedure) is an exact copy of this California statute. The Court in that case held the particular statute to have the following effect as regards the right of possession under a mortgage at page 1008, viz.:

> "It is familiar learning that at common law a mortgage vests the legal title in the mortgagee, and upon condition broken the mortgagee might re-enter or bring ejectment. Our statute, however, has taken from the instrument its common-law character, and deprived the mortgagee of all possession, or right of possession, either before or after condition broken; and before this right exists the mortgagee must foreclose his mortgage, and sell the mortgaged property."

In *Lewis v. Hamilton,* 26 Colo. 263, 58 Pac. 196, 197, the Colorado Court, again recognizing the effect of the statute in question, held that, as is clearly set forth in the statute, the mortgagor remains entitled to retain possession until deprived of such right in a valid foreclosure proceeding. More particularly, and diametrically opposed to the language of the Court in *Burns v. Hiatt,* supra, the Colorado Supreme Court held that possession obtained by a mortgagee under a void foreclosure is not sufficient to constitute him a mortgagee in possession or to permit the mortgagee to claim any rights under that doctrine, and that the mortgagor in such case was entitled to have possession restored to him. Obviously this is the only proper legal conclusion. Inasmuch as a mortgagor in our State is given the right of possession by express statutory provisions, it is absolutely inconceivable that he could be deprived of such rights by or through a void foreclosure proceeding. A proceeding which is void cannot possibly impair, affect or cut off rights in such fashion. A void foreclosure proceeding could have no such effect, and the right to possession would still remain in the mortgagor thereafter. Principles

of jurisprudence, too well settled to require citation of authority, permit of no other conclusion.

Opposing counsel cite a leading authority on the subject, namely, *Jones on Mortgages* (8th ed.), Volume 2, page 219, wherein the author, clearly recognizing that the possession necessary to entitle a mortgagee to claim any rights under the doctrine must be a "legal" possession, as distinguished from a mere physical possession unsupported by any legal right, says:

> "To be *legal*, the possession must have been taken in good faith, free from deceit, fraud, *or wrong, and without violation of any contract relation with the mortgagor.*" (Italics ours.)

Under familiar fixed principles of construction, it must be conceded that the California code sections must be considered as part of the junior mortgagee's mortgage contract, inasmuch as there were no provisions in the mortgage in question to the contrary; that is, no provisions whereby the mortgagor had consented in advance to the mortgagee taking possession in the event of default. Such being the case, it is clear that the instant situation does not disclose any legal possession in the junior mortgagee within the principle announced in the text last quoted, because, as we have pointed out, the junior mortgagee's possession and operation of the property constituted a continuing trespass,—clearly a "wrong" within the meaning of said text. It, moreover, constituted a "violation of * * * contract relation with the mortgagor", namely, the mortgage of which the existing statutes above mentioned must be considered a part.

Opposing counsel failed to refer to a further and more pertinent discussion of this subject as expressed at page 222 of *Jones on Mortgages,* supra. Expressly referring to the effect of statutes similar or identical to our code section, Jones there states:

> "*Where mortgagor is given right to possession by statute.* In a few states, however, by virtue of peculiar provisions of statute, the mortgagor may recover possession from the mortgagee at any time before his rights have in some manner been foreclosed. *If he goes into possession without permission of the mortgagor he may be removed by suit in ejectment.*" (Italics ours.)

The Colorado case, *Lewis v. Hamilton,* supra, is cited in support of this portion of the text, and, as we have pointed out, the Colorado statute is a copy of the California code section.

Other states are in accord with these principles. For example, in *Newport v. Douglas,* 12 Bush (Ky.) 673, the Court held that:

> "A mortgagee, not having the absolute right to possession of the mortgaged property, does not have the right to the rents and profits, but must secure such incidents by express contract, and if he fails to do so, he must reach them through proceedings in equity."

Another case properly holding that possession obtained through a void receivership is not sufficient is *Empire Trust Co. v. Kermacoe Realty Co.,* 266 N. Y. S. 685, 686, decided in 1933. In that case a receiver appointed at the instance of a mortgagee collected rents and profits. Thereafter his appointment was

vacated as having been invalid and the Court compelled the receiver to pay over the rents so collected to the mortgagor against the objection of the mortgagee. The decision reads as follows:

> "The assignment of rents (which was contained as a clause in the mortgage itself), as in the case cited, constituted security for the payment of the mortgage indebtedness. Until the plaintiff actually possessed itself of the rents, or obtained them through a receiver appointed upon its application, *the rents remained the property of the owner of the fee.* Although a receiver was (on motion of the plaintiff) appointed, the appointment was subsequently vacated as invalid, and *the plaintiff's rights must be determined on the assumption that there was no receivership.* Indeed, both the order vacating the appointment of the receiver and the order of the Appellate Division affirming that order and striking out the provision in the order reappointing the receiver which sought to give his reappointment retroactive effect would be without point if the mortgagee upon whose application the receiver was named were held to be entitled to the rents collected under the void receivership." (Italics ours.)

We have heretofore pointed out that the junior mortgagee in our case obtained physical possession by simply taking advantage of a temporary vacancy of the premises, without the knowledge of the mortgagor. In a similar situation the New York Court in *Hermann v. Cabinet Land Co.,* 112 N. E. 476, 477, expressed itself as follows:

"But in a case like this, where the owners of the equity of redemption have not been served and they are complaining, it would be unjust to say that their only remedy against the purchaser is an action for an accounting and for permission to redeem the premises from the mortgage. *If that were the law, the mortgagee in most cases would only have to await a time when the mortgaged premises were temporarily unoccupied and enter peacefully thereon, and the mortgagor would then be limited to an action to redeem with all the burden of attack and of proof resting upon him.* No case cited by the defendant from the courts of this State goes to the extent of so holding." (Italics ours.)

Also, that Court stated:

"In that case, the owners of the equity of redemption were not made parties to a suit in foreclosure, and the judgment against them was enforced by a writ of assistance which put the mortgagee in possession. *The court held that the possession of the mortgagee was without lawful authority and amounted to a trespass. Deutsch v. Haab,* 135 App. Div. 756, 119 N. Y. Supp. 911, is to the same effect." (Italics ours.)

The Texas Court viewed the situation in similar fashion in *Galloway v. Kerr,* 63 S. W. 180, 185 (Tex. Civ. App.). In that case, the mortgagor had temporarily left the premises vacant. The mortgagee, taking advantage of this, took physical possession and put a tenant upon the premises without seeking or obtaining the mortgagor's consent thereto. The mortgagor sued to recover the possession, and the Court held in his favor, saying:

> "* * * A mortgage is not a conveyance of the fee, but a mere security for debt, and * * * the legal title and right of possession do not pass to the mortgagee. *The possession of the mortgaged premises by the mortgagee without the consent of the mortgagor or a foreclosure of the mortgage is wrongful,* and it is not necessary for the mortgagor to pay the debt in order to recover possession of the premises." (Italics ours.)

That Court furthermore held:

> "Rightful possession can not be inferred from failure of the mortgagor to take steps to regain possession after wrongful entry of the mortgagee."

Clearly indicating that a distinction must be made between mere physical possession and lawful possession, and effect given to such distinction, is *Gustin v. Crockett,* 44 Wash. 536, 87 Pac. 839. In that case the mortgagee obtained possession by means of void process in an ejectment suit. The mortgagor brought the present action to recover possession and the defendant mortgagee defended by claiming to be a "mortgagee in possession". The Court held in favor of the mortgagor, properly deciding that the defendant mortgagee was not entitled to claim the rights of a mortgagee in possession, the Court saying:

> "It is true * * * that respondents (mortgagees) were in *actual* possession when suit was begun, but the facts alleged with reference to their possession do not show they are mortgagees in possession. * * * The elements which estab-

lished the rights of a mortgagee in possession do not therefore exist here." (Italics ours.)

We submit that the "element" referred to by the Court which must necessarily be present in order to permit a mortgagee to claim rights under this doctrine, obviously is the consent of the mortgagor.

If *Burns v. Hiatt,* supra, the case cited by opposing counsel, announced the law as it may ever have stood in California, it is clear that this case has been overruled by later cases and is no longer the law. We refer particularly to the *Snyder* case, supra, decided by the California Supreme Court in October of 1934. After referring to certain California Code sections, including those herein cited, and recognizing the effect thereof, and after pointing out that a trust deed and a mortgage are treated as similar in this State that Court, in an exceedingly well reasoned opinion held, at pages 701-702, as follows:

> "The right to possession does not pass to the trustee or the beneficiary under a trust deed in the absence of a special agreement. (*Meadows v. Snyder,* 209 Cal. 270; 286 Pac. 1012; 25 Cal. Jur. 41, 42; 41 Cor. Jur. 609, sec. 575). We must apply, therefore, the same rules as to the rights of the trustee or the beneficiary to possession of the premises *as are applicable by statute* in the case of a mortgagee, *whose rights to possession, whether before or after default, are controlled by the agreement, or the consent otherwise of the mortgagor, express or implied.* (Civ. Code sec. 2927; *Meadows v. Snyder,* supra; *Cameron v. Ah Quong,* 175 Cal. 377, 165 Pac. 961; *Dutton v. Warschauer,* 21 Cal. 609; 17 Cal. Jur. 1020-

> 1022; 1 Jones on Mortgages, 8th ed. sec. 22). Where a mortgagee, and likewise a trustee or beneficiary under a trust deed, wrongfully ousts the one entitled to possession, he is liable as a disseisor. (19 R. C. L. 316; *Meadows v. Snyder,* supra)." (Italics ours.)

This holding, representing the last word of the California Supreme Court, constitutes the complete answer to appellant's contention that the mortgagor's consent is an immaterial element in the doctrine of mortgagee in possession. That Court plainly said that such consent is the controlling feature under the doctrine and indicated that such consent must be acquired in either one of two possible ways, viz: "by (1) the agreement, or (2) the *consent otherwise* of the mortgagor express or implied".

An earlier case, but one which is oft cited as a leading case, is *Freeman v. Campbell,* 109 Cal. 360, 363. In that case the mortgagee took physical possession without the mortgagor's consent and thereafter collected certain rents. The mortgagor sued to recover the rents thus received, and the Supreme Court affirmed a judgment in favor of the mortgagor for the recovery of said rents. Clearly indicating that consent is necessary to entitle the mortgagee to collect and retain rent, the Court stated as follows:

> "The taking possession of the land by Campbell after the death of Anderson was not by virtue of any agreement between them, *and consequently conferred no additional right upon him as mortgagee.* * * * The present action is not brought to recover the rents and profits as dam-

> ages for the withholding of the land by Campbell, but for monies had and received by him to the use of the plaintiff. Their receipt by him constituted a transaction as independent of the mortgage as would have been the receipt by him of any other monies belonging to the estate of Anderson; *and, as they were taken by him without any authority from Anderson, (the deceased mortgagor), and without the implied power of a 'mortgagee in possession' to apply them in reduction of the mortgage debt, he had no right, without the permission of the plaintiff, to make such application.* * * *" (Italics ours.)

The foregoing authorities conclusively establish, we submit, that a mortgagee cannot acquire the right to possession except through foreclosure proceeding had *against the mortgagor as a necessary party, or with the consent, express or implied, of the mortgagor*. Stated differently, the cases establish that the right to possession remains in the mortgagor unless and until wrested from him by Court proceeding in the nature of a foreclosure, to which the mortgagor must necessarily be made a party, or unless the mortgagor voluntarily gives up such right either by an agreement contained in the mortgage or by consent in some other form, express or implied.

Since the junior mortgagee never at any time or in any manner acquired the right of possession he acquired no lawful right to the monies in dispute but the right thereto remained and still remains in the mortgagor; and since the junior mortgagee obtained no right to said money, the senior mortgagee can claim no derivative right thereto inasmuch as

there was no right in the junior mortgagee upon which to base such derivative rights. And since the senior mortgagee never attempted to obtain the right of possession in the manner expressly required by the terms and conditions of the deed of trust or in any other manner which can be considered as effective as against the mortgagor, the senior mortgagee never acquired the right to possession or any right to the monies in question.

In passing we wish to point out and stress the fact that although the appellant did finally obtain actual possession of the mortgaged premises, when such possession was surrendered to it by Andrews on August 12, 1933 (Record, page 77) this did not take place until after all of the moneys in dispute had already been collected by Andrews.

Next we shall consider appellant's contention to the effect that the lower Court's finding that the junior mortgagee took possession without the consent of the mortgagor (Record, page 87), is allegedly not sustained by the evidence.

(3) The finding that the junior mortgagee took possession without consent, express or implied, is amply supported by the evidence.

As a preface to our discussion of the finding in question, we here point out the familiar principle that all presumptions and intendments must be indulged in by an Appellate Court in favor of the validity of the findings. The burden is always on the appellant to demonstrate that any particular finding is unsupported by evidence.

Merrill v. L. A. Cotton Mills, Inc., 120 Cal. App. 149, 162.

We submit that appellant has utterly failed to carry the aforesaid burden or to point out wherein the evidence is insufficient. On the contrary, a consideration of the evidence shows it to be amply sufficient to support the finding that the junior mortgagee (Andrews, as trustee in bankruptcy) took possession without the mortgagor's consent. No circumstance of any kind is disclosed in the record from which such consent might be implied; and we do not understand that appellant goes so far as to contend that any express consent was furnished. Appellant's position, as we understand it, is one where it is contending that mere silence on the part of the mortgagor allegedly constituted consent. No affirmative action has been pointed out as constituting any alleged consent. Appellant apparently relies on inaction rather than on any affirmative action of the mortgagor.

The record shows (Record, pages 38-39) that the junior mortgagee went to the Diamond Range and, finding the same vacant and inactive, thereupon taking advantage of such vacancy, entered upon and thereby acquired the physical possession of the property. Andrews up to that point had not sought or obtained the consent of the mortgagor, nor did he notify the mortgagor of his intentions in this respect. So far as appears the mortgagor had no knowledge of the intentions or actions of the junior mortgagee. The situation thus far was wholly one of inaction on the part of the mortgagor.

Some time thereafter Andrews, according to his testimony, purely by coincidence met upon the street

and there spoke with a Mr. William C. Crittenden who was an officer of the mortgagor corporation. During this conversation Andrews told Crittenden that he proposed "to take possession of the 'Diamond Range'" (Record page 40) and Crittenden offered no objection to his so doing. As a matter of fact, according to the record, Andrews had already taken physical possession prior to his conversation with Crittenden. Andrews in testifying, admitted that he did not know whether or not Crittenden was an officer of the mortgagor corporation. Inasmuch as this meeting and conversation between Andrews and Crittenden was admittedly purely casual and by accident, and since Andrews did not even know that Crittenden was an officer, it is obvious that Andrews was not then or thereby seeking to obtain the consent of the mortgagor. As pointed out, he, as a matter of fact, had already taken possession of the property without consent. It should be quite obvious, we submit, that Andrews was not in the slightest interested whether he had consent or not. It was obviously immaterial to Andrews whether or not he obtained the mortgagor's consent and it is equally obvious he had chosen to disregard the mortgagor entirely as far as his operating the property was concerned. We submit that a finding of consent, either express or implied, could not properly be based on so tenuous a circumstance as the mere passing conversation in question.

It is an admitted fact in this case that the minutes of the mortgagor corporation are wholly silent and

fail to show that any action was taken by its board of directors with reference to approving or consenting to the action of the junior mortgagee in taking possession. (Record page 42.) In fact, in claiming to have taken possession of the property with the consent of the mortgagor, the junior mortgagee conceded that it relied solely on the momentary conversation had between Andrews and Crittenden. (Record page 39.)

Although Crittenden was an officer of the mortgagor corporation, there was no showing made that he had authority to consent to possession being taken or held by the junior mortgagee. The burden of making such a showing, in order to bind the corporation, was and is upon the appellant in this case, who is thus seeking to take advantage of and rely upon these matters. Where a mortgagee attempts to claim possessory rights against a mortgagor who is asserting contrary rights, the burden is on the mortgagee to justify its action in seizing possession.

Snyder v. Western Loan & Building Co., supra, p. 702.

The Diamond Range was presumably a valuable asset of the corporation, possibly its sole asset. The right to possession thereof which, according to the aforesaid code sections, still remained in the mortgagor corporation, likewise constituted a valuable asset as is demonstrated by the very fact that Andrews accumulated monies from the operation of the property. Under well settled and fundamental principles of corporation law, an officer of a corporation

has no power or authority, merely by virtue of his office, to bind the corporation or to dispose of its assets, particularly capital assets, excepting and to the extent as such power may have been conferred upon him by the stockholders or board of directors. No claim can be made that the alleged transaction took place in the ordinary course of business of the corporation. No contention is made that Andrews paid any consideration to the corporation in exchange for the alleged right to possession, and certainly an officer cannot bind a corporation by attempting to make a voluntary gift of a valuable corporate asset.

Black v. Harrison Home Co., 155 Cal. 121;
Grummett v. Fresno Glazed Cement Pipe Co., 181 Cal. 509;
Alta Silver Mining Co. v. Alta Placer Mining Co., 78 Cal. 629.

It is to be further noted that at the time of the conversation between Andrews and Crittenden, the capital stock of the mortgagor corporation was the subject of a trust indenture executed in favor of Pacific National Bank, as Trustee, and that during the month of September 1932, which was the time when Andrews acquired physical possession, the said Pacific National Bank came into possession of all of the outstanding capital stock of the mortgagor corporation, and officers of the Pacific National Bank were regularly substituted for and as officers of said mortgagor corporation, Crittenden thereupon ceasing to be an officer thereof. (Record page 41.) *Shortly thereafter a representative of Pacific National Bank*

advised the junior mortgagee that his possession of the property was illegal. (Record page 41.) In view of this circumstance, we submit that not only did Andrews take possession without the consent of the mortgagor but actually the case must be considered as one where the mortgagee gained physical possession *against the consent* of the mortgagor. As further showing that not only did the mortgagor fail to give consent, either express or implied, but moreover objected affirmatively to Andrew's possession, is the fact that the mortgagor served a written demand upon Andrews to the funds derived by Andrews from his possession of the property. (Record page 19.)

(4) There is no basis upon which appellant can insist upon the payment of taxes.

A reading of appellant's brief puts us in mind of a retreating army, which, realizing that defeat is inevitable, momentarily falls back from one supposed stronghold to another, merely hoping to postpone the fatal moment. Appellant commenced by claiming *all* of the monies in the hands of the junior mortgagee representing the proceeds of his operations for the entire period. Thereupon, quickly realizing the futility of this claim appellant retracted somewhat, indicating it would be satisfied to receive the proceeds which accrued subsequent to the time appellant petitioned for sequestration. As has been pointed out, appellant thus released its claim to $658.66, a portion of the fund. Down to this point appellant's claim to the monies has been a broad, general one based upon the doctrine of "mortgagee in possession". Now, however, in con-

tending that the Court erred in not directing the payment of taxes out of the rents and profits, the appellant seems content to stand upon a much narrower ground, merely contending that it would be "improper and inequitable to permit the revenues from the property to be turned over to the owner of the property".

The total unpaid taxes amount to $11,147.84, *of which total amount only the sum of $2856.86 represents the taxes which accrued while the junior mortgagee was operating the property.* (Record page 90.) The remainder of said total sum represent the taxes which had accrued and become delinquent prior to the time Andrews went upon the property and commenced to operate it.

Appellant, at page 25 of its brief, after referring particularly to the taxes in the aforesaid smaller amount, namely, the taxes which accrued during the operations in question, asserts that the taxes of this last mentioned class should be considered as an operating charge, and thereupon puts forth the contention that it would be inequitable for the Court to permit Andrews to pay over the rents and profits to the mortgagor-owner until such accruing taxes had been paid.

In considering this last contention of appellant, we wish to point out and to stress the fact *that none of these taxes, either accrued or delinquent, were ever actually paid out by the junior mortgagee.* (Appellant's Brief, page 24.) This is a very important factor, for the reason that while the junior mortgagee is undoubtedly entitled to deduct from the gross rentals received by him, such amounts as he actually paid out

or became individually liable for, certainly, under no possible theory could he deduct for any items which had not been actually paid or personally incurred by him in the course of his operations. Thus, if Andrews had actually paid out any monies for taxes it may well be that he could claim reimbursement for amounts actually so paid out or could insist on being indemnified or protected against any liability he might have personally so incurred. However this may be, the fact remains he did not pay any taxes whatever, he incurred no personal liability therefor, nor was he under any duty, either to the mortgagor or to the appellant as senior mortgagee, to pay or see to the payment of any taxes. (41 C. J., Sec. 623, page 641.)

In each of the two cases cited by appellant in connection with its claim concerning taxes, the taxes had *actually* been advanced and paid out by the person in possession (who were receivers appointed in the course of foreclosure proceedings). Both of these cases are, therefore, readily distinguishable. They stand for the proposition, merely, that where taxes are actually and in fact paid out, they can be deducted. As just pointed out, this principle is not involved in our case.

We have no hesitancy in asserting that there is no basis, legal or equitable, upon which appellant can require the payment of these unpaid taxes. Clearly, the delinquent taxes cannot be considered as an operating charge, nor can the accruing taxes be so considered inasmuch as they were not paid in fact.

In thus attempting to compel the payment of taxes, appellant in reality is attempting to direct the disposi-

tion of a fund to which, as the lower Court has found, appellant has no claim and in which it has no right or interest. If appellant owned the whole or any part of these rent monies, naturally, as such owner, it could direct and compel the disposition of the monies. Inasmuch as the mortgagor, as heretofore pointed out, was not bound by the sequestration proceedings since it was not a party thereto, it is not bound by the purported order of sequestration, much less by the portion thereof purporting to direct the payment of taxes. *That order had no more effect upon the mortgagor, or upon the funds to which the mortgagor is entitled, than would an attempted assignment by the appellant of monies in which it had no right, title or interest.*

If the appellant itself had paid the taxes on the mortgaged property, it could have claimed reimbursement therefor from the mortgagor. The mortgage so provides. But the mortgagor's right to reimbursement in such event would have had to be enforced by and through the mortgage itself. In other words, the mortgagor's obligation to reimburse the mortgagee for taxes paid in such case would simply have stood on the same footing as any other obligation for which the mortgage constituted security. A mortgagee, in such case, could no more insist upon the mortgagor reimbursing him for taxes out of any particular rents or profits than he could insist on the payment, out of particular income, of interest or principal or any other obligation secured by the mortgage. While a mortgagor may be under a duty to pay taxes, his duty extends no further, and he is under no duty to apply any

particular rents or profits to the payment of taxes. (41 *C. J.*, page 639.) Taxes paid by a mortgagee simply increases the amount due under and secured by the mortgage.

CONCLUSION.

Appellant has seen fit to conclude its argument by asserting it would be unfair to appellant to permit the mortgagor to receive the rents and profits in dispute unless and until the mortgaged property, of which the appellant has now taken possession, were first freed from the lien of these taxes. As we view this case, appellant has no ground whatsoever upon which to complain in this fashion. Several possible remedies, any one of which would have been fully adequate to protect appellant and enforce any and all rights it might have had, were readily available to it at the time it first attempted to enforce its rights by means of the sequestration proceedings. By but very slight additional effort on its part, appellant could have obtained full and complete relief in these very same sequestration proceedings, for appellant would simply have had to promptly join the mortgagor as a party to those proceedings, in order to bind it thereby, by obtaining the issuance of an order to show cause upon its petition for sequestration and serving the same upon the mortgagor. Instead of so doing, appellant, voluntarily and of its own free will, chose to entirely ignore the mortgagor in those proceedings and was wholly content to stand by and rely upon the junior

mortgagee to take such necessary steps and summon in the mortgagor which, unfortunately for the mortgagor, came too late to affect the monies in question.

Thus, as far as the mortgagor is concerned, the appellant cannot complain of results which arose entirely and solely through appellant's own fault. Appellant has no one but itself to blame for the position in which it now thus finds itself.

It is therefore submitted that the order appealed from must be affirmed in its entirety, as to the whole of the monies now in the hands of Frank T. Andrews, as trustee in bankruptcy of Alexandria Hotel Realty Corporation, bankrupt, namely the sum of $4359.03.

Dated, San Francisco,
May 31, 1935.

Respectfully submitted,
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